85-1890

Supreme Court, U.S.
FILED
MAY 5 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

OF AMERICA

October Term, 1985

KADIN CORPORATION,

Petitioner,

v.

THE UNITED STATES,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Charles R. Schrader
ALLEN, KILMER, SCHRADER,
YAZBECK & CHENOWETH, P.C.
1600 Orbanco Building
1001 S. W. Fifth Avenue
Portland, Oregon 97204
(503) 224-0055

Attorney for Petitioner

I. QUESTIONS PRESENTED FOR REVIEW

A. May a federal court sua sponte dismiss a plaintiff's claim with prejudice under Fed. R. Civ. P. 41(b) without first applying any lesser sanctions?

B. May a federal court sua sponte dismiss a claim with prejudice under Fed. R. Civ. P.41(b) without any showing of prejudice to defendant and no showing of need of convenience to the court or other potential litigants?

C. Can a sua sponte dismissal for violation of a court order under circumstances described in A and B ever be an exercise of sound discretion as a matter of law when the only uncorrected failure to prosecute amounts to a delay of approximately one week?

TABLE OF CONTENTS

I. QUESTIONS PRESENTED FOR REVIEW. . i

II. OPINIONS BELOW. 1

III. JURISDICTION. 1

IV. STATUTORY PROVISIONS INVOLVED . . 1

V. STATEMENT OF THE CASE 2

VI. REASONS FOR GRANTING THE WRIT . . 11

A. This Court Should Grant the Writ Because the Federal Circuit's Interpretation of Fed. R. Civ. P. 41(b) Is in Conflict With Several Other Circuits 11

B. This Court Should Grant the Writ in Order to Assert Its Supervisory Powers to Reverse the Order of Dismissal. 17

VII. CONCLUSION. 21

APPENDIX

A. OPINION OF THE FEDERAL CIRCUIT

B. ORDER OF DISMISSAL FOR FAILURE TO PROSECUTE

ORDER OF DISMISSAL PURSUANT TO RUSCC 41(b)

C. JUDGMENT IN THE UNITED STATES CLAIMS COURT

ORDER DENYING PETITION FOR REHEARING

TABLE OF AUTHORITIES

CASES

Brown v. O'Leary, 512 F.2d 485 (5th Cir. 1975). 14

Cherry v. Brown-Frazier-Whitney, 548 F.2d 965 (D.C. Cir. 1976) 13

Connolly v. Papachristid Shipping, Ltd., 504 F.2d 917 (5th Cir. 1974). . . 15

Givens v. A. H. Robbins Co., Inc., 751 F.2d 261 (7th Cir. 1984). 15

Hanna v. Plummer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1964). . . . 12

Joplin v. Southwestern Bel. Tel. Co., 671 F.2d 126 (10th Cir. 1982) . . 12

Link v. Wabash Railroad Co., 370 U.S. 632, 82 S.Ct. 1386 (1962) 13

Magnum Import Co. v. Coty, 262 U.S. 159, 43 S.Ct. 531, 67 L.Ed. 922 (1923) 12

Nealey v. Transportacion Maritima Mexicana, S.A., 662 F.2d 1275 (9th Cir. 1980). 16

Richman v. General Motors Corporation, 437 F.2d 196 (1st Cir. 1971). . . 15, 16

S. v. Wermers, 557 F.2d 170 (8th Cir. 1977) . . . . . .

Scarborough v. Eubanks, 747 F.2d 871 (3d Cir. 1984). 19

Trakas v. Quality Brands, Inc., 759 F.2d 185 (D.C. Cir. 1985). 14

Universal Camera Corp. v. NLRB, 340 U.S. 498, 71 S.Ct. 456, 95 L.Ed.2d 479 (1951). 12

White Moun. Apache Tribe v. United States, 5 Cl. Ct. 288 (1984). 19, 21

STATUTES

28 U.S.C. § 1254(1). 1
41 U.S.C. § 601. 3

RULES

Fed. R. Civ. P. 41(b). 1-10, 11-13, 15-19 22

RUSCC 41(b). 2

Sup. Ct. R. 17.1(a). 18

II. OPINIONS BELOW.

The opinion of the Court of Appeals for the Federal Circuit, not yet reported, appears in Appendix A, attached hereto. The opinion of the United States Claims Court was not reported. Attached hereto in Appendix B are the Claims Court's Order of Dismissal, dated March 1, 1985, and Dismissal, dated April 2, 1985.

III. JURISDICTION.

The judgment of the Court of Appeals for the Federal Circuit was entered on January 23, 1986. A timely petition for rehearing was denied on February 7, 1986. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

IV. STATUTORY PROVISIONS INVOLVED.

1. Rule 41(b) of the Federal Rules of Civil Procedure provides, in pertinent part:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal

> of an action or of any claim against him. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

2. Rule 41(b) of the Rules of the United States Claims Court provides, in pertinent part:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, the court may dismiss on its own motion or defendant may move for dismissal of an action or any claim. . . . Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

V. STATEMENT OF THE CASE.

On June 2, 1981, petitioner Kadin Corporation ("Kadin") entered into a contract

with the Small Business Administration to perform construction work for the United States Department of Transportation on the Big Salt Highway in the state of Alaska. Kadin presented several claims to the Contracting Officer following performance of the contract. After the Contracting Officer denied certain of petitioner's claims, it filed its complaint in the United States Claims Court on January 18, 1983. The jurisdiction of the Claims Court was invoked pursuant to the Contract Disputes Act, 41 U.S.C. § 601. Plaintiff's claims were for additional costs incurred in performance of the contract.

On July 12, 1983, Judge Judith Ann Yanello issued an Order re: Rule 16, setting a time table for certain exchanges between the parties. Petitioner initiated discovery by sending a Request for Production of Documents to opposing counsel. In its cover

letter, petitioner stated that it did not plan to serve a request for admissions. On November 4, 1983, Judge Yanello ordered the parties to file a status report within thirty days. Counsel for petitioner responded, stating that it had served defendant with a request for production of documents and that "the only other discovery that plaintiff anticipates, at this time, is deposing the Contracting Officer's representative." On November 9, 1983, defendant served on petitioner interrogatories and requests for production of documents. Plaintiff served its initial response to the interrogatories on December 9, 1983. On December 29, 1983, petitioner served Amended Answers to the Interrogatories, pursuant to its obligation to update its responses. Petitioner also timely responded to the United States' request for production of documents. Petitioner informed opposing

counsel that it was unable at that time to locate the reverse of plaintiff's original bid worksheet and daily diaries prepared by petitioner's employees. By letter, dated March 29, 1984, petitioner's counsel informed opposing counsel that a search had been made for those documents and that they were not located.

On December 30, 1983, counsel for defendants served upon plaintiff a "Notice Pursuant to Footnote 4" which indicated that plaintiff had not yet served on defendant requests for admission in accordance with the court's Order re: Rule 16, and that those requests should have been served by September 20, 1983. Some three and one-half months earlier, petitioner had sent a letter to opposing counsel stating that it did not intend to serve such requests upon defendant. Petitioner had also informed the court in its November 29 Status Report that

it did not intend to serve such requests, as it believed they were not necessary.

In response to defendant's "Notice", petitioner filed a motion seeking an order allowing it to waive service of the requests for admissions in order to expedite completion of pretrial and to serve a comprehensive statement of facts upon defendant's counsel following depositions. Counsel indicated it did not interpret the pretrial order as requiring service of admissions upon defendant. On January 20, 1984, Judge Yanello ordered petitioner to serve requests for admissions within thirty days. Requests were thereupon served on February 17, 1984.

On March 2, 1984, the United States filed a Motion to Compel Discovery, alleging that several answers to interrogatories were evasive or incomplete. Petitioner did not oppose the motion and it was allowed on

April 2, 1984. On March 29, 1984, counsel for the United States filed a Motion to Suspend the Pretrial Order until sixty days after plaintiff had fully answered defendant's interrogatories. The motion was allowed.

In reviewing the United States' objections to petitioner's responses to the interrogatories, counsel for petitioner for the first time was apprised that its excavation claim should be replead should also contain a breakout of the actual cost of excavation. Counsel for petitioner for thereupon diligently attempted to contact those employees within petitioner's corporation who could provide the necessary information to amend the complaint. The person who possessed this information, plaintiff's principal manager, James Stough, was at this time earning his living on fishing boats and in other remote sites in Alaska, and counsel

could not communicate with him until the fall of 1984. Petitioner could not amend its answers to the interrogatories without Mr. Stough's assistance and was thus unable to comply with the court's April 2 Order granting defendant's Motion to Compel. On August 3, 1984, petitioner moved the court to suspend the pretrial order, stating that it realized its excavation claim was not properly pled and requested time to replead the claim. Counsel for the United States was made aware of petitioner's difficulties and did not oppose the motion. On August 23, 1984, petitioner's motion was allowed and the court additionally ordered that petitioner file the amended complaint eight days later, on September 1, 1984, and also amend its interrogatory answers by that date. In sum, there were no outstanding delays or "failures to prosecute" as of September 1, 1984.

Nevertheless, because Mr. Stough could not be contacted sooner, counsel for petitioner was unable to assemble the information needed to amend the complaint in time to meet the court's deadline and did not file the amended complaint by September 1, 1984. On September 21, 1984, Judge Yanello issued an Order to Show Cause why the complaint should not be dismissed for petitioner's failure to prosecute because it had not amended its responses to the interrogatories or amended the complaint. Petitioner received the Order to Show Cause on September 27, 1984. The response was due October 8, and counsel mailed its response on October 9, 1984, technically one day tardy. Unfortunately, petitioner's response was apparently not received by the Clerk of the Claims Court until October 15, 1984, and was rejected by the Clerk as untimely filed. Thus, to put the matter in perspective, the

untimely filing which resulted in the sua sponte dismissal was approximately one week late. At all times, the court was apprised of the underlying facts, Counsel, however, admittedly did not comply in every aspect of procedurally requesting the time in which to advise the court.

Meanwhile, petitioner's counsel was finally able to meet with Mr. Stough and immediately amended the excavation claim. Petitioner attempted to file its amended complaint with the court on October 31, 1984, but the Clerk refused to accept the complaint for filing.

Petitioner then filed a Motion for Leave to File Amended Complaint which was unopposed by defendant. In fact, recognizing the situation, the defendant cooperated on November 13, 1984, by filing a Motion for Enlargement of Time seeking 45 days in which to answer the Amended

Complaint. In its Order of Dismissal, the Claims Court denied petitioner's motion to amend its complaint.

An Order of Dismissal pursuant to Rule 41(b) and a Final Judgment were filed by Judge Yanello on March 1, 1985. Petitioner thereupon attempted to file a Motion to Set Aside the Order of Dismissal, along with a supporting affidavit of counsel, on April 1, 1985. The motion and affidavit were rejected by the Clerk of the Court as untimely. In an Order dated April 2, 1985, unholding her dismissal, Judge Yanello nevertheless made the motion and affidavit of counsel part of the record.

VI. REASONS FOR GRANTING THE WRIT.

A. This Court Should Grant the Writ Because the Federal Circuit's Interpretation of Fed. R. Civ. P. 41(b) is in Conflict with Other Circuits.

This case presents important questions of whether a federal court may employ the ultimate sanction of dismissal with

prejudice sua sponte under Fed. R. Civ. P. 41(b) of a plaintiff's claim, without regard to plaintiff's litigation activity, in absence of prejudice to defendant and in absence of facts showing unusal delay or any particular need for judicial action at all, without considering any lesser appropriate sanctions. By upholding the dismissal of plaintiff's complaint by the U.S. Claims Court, the Court of Appeals for the Federal Circuit allowed a trial court to sua sponte employ Fed. R. Civ. P. 41(b) seriously in conflict with other federal circuits and inconsistently within the Claims Court itself. The serious lack of uniformity in application of Fed. R. Civ. P. 41(b) created by the Federal Circuit's decision in this case requires review by this Court to establish a uniform rule of law and avoid injustice. Magnum Import Co. v. Coty, 262 U.S. 159, 43 S. Ct. 531, 67 L.Ed. 922

(1923); Universal Camera Corp. v. NLRB, 340 U.S. 498, 71 S. Ct. 456, 95 L.Ed.2d 479 (1951). Review by this Court is particularly appropriate when the goal of uniformity of federal procedure is threatened, as here, by a decision of the court below. Hanna v. Plummer, 380 U.S. 460, 463, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1964).

The court may order dismissal with prejudice sua sponte. Link v. Wabash Railroad Co., 370 U.S. 632, 82 S. Ct. 1386 (1962). But such dismissal is proper only upon exercise of "sound discretion." Joplin v. Southwestern Bell Tel. Co., 671 F2d 1274 (10th Cir. 1982). This Court has never addressed the standards for the extraordinary interjection of the trial court into a matter proceeding without prejudice to defendant.

Some circuits have viewed a sua sponte dismissal most strictly, especially when

there has been no prejudice to defendant, Brown v. O'Leary, 512 F.2d 485 (5th Cir. 1975). In fact, after Order to Show Cause had issued, defendant requested 45 additional days in which to answer the proferred Amended Complain.

Moreover, while it is acknowledged that such a judicial act is appropriate in extreme circumstances, the present record is devoid of evidence of such facts in this case. There is no conclusion that dismissal was in fact necessary for the convenience of the court. While the action could have been taken at the instance of the court, ostensibly for other potential litigants seeking access to the court, there is absolutely no evidence that the court's docket was particularly clogged. Instead, there is no that this case was unusually protacted. There is instead evidence of considerable timely litigation activity, and

there is also evidence of good faith error by counsel. But no misunderstanding by counsel was left unremedied. The court was kept informed of progress and any reasons for delay in the case. What is at the heart of this dismissal is plaintiff's failure to follow the precise rules of the court and perform in strictest compliance with the court's order, but not a failure to prosecute the case.

The power of the court to dismiss for failure to comply with "any order of the court" is especially limited. S. v. Wermers, 557 F.2d 170, 173 (8th Cir. 1977). It is even more imperative to search the record for "sound discretion" when the "rule" which is technically violated, and the dismissal itself, stem from the court's motives, not the other party or generally promulgated court rules.

All the Courts of Appeals which have

reviewed Rule 41(b) dismissals have consistently held that a dismissal for failure to prosecute is the harshest sanction to be ordered only as a last resort in response to extreme acts of a recalcitrant plaintiff. Lesser sanctions are always to be considered and applied, and then only in the face of continued consturnacious behavior by the plaintiff, may dismissal be ordered.

In Trakas v. Quality Brands, Inc., 759 F.2d 185, 186-187 (D.C. Cir. 1985), for example, the court stated:

> The law of this circuit partakes of the general view that dismissal is an extremely harsh sanction and may be reversed when discretion is abused. Since our system favors the disposition of cases on the merits, dismissal is a sanction of last resort to be applied only after less dire alternatives have been explored without success. (citations omitted)

Similarly, the Court of Appeals for the First Circuit has stated:

> Dismissal is a harsh sanction which should be resorted to only in extreme cases. The court has a broad panoply of lesser sanctions available to it. Moreover, the power of the court to prevent undue delays must be weighed against the policy of the law favoring disposition of cases on their merits. Moreover, as stated by Judge Wisdom in Durham v. Florida East Coast Ry. Co., 385 F2d 366, 368 (5th Cir. 1967),
>
> > "'[t]he sanction of dismissal is the most severe sanction that a court may apply, and its use must be tempered by a careful exercise of judicial discretion.' Durgin v. Graham, 1967, 5 Cir., 372 F.2d 130, 731. The decided cases, while noting that dismissal is a discretionary matter, have generally permitted it only in the face of a clear record of delay or contumacious conduct by the plaintiff."

Richman v. General Motors Corporation, 437 F.2d 196, 199 (1st Cir. 1971) (citations omitted); See also, Connolly v. Papachristid Shipping Ltd., 504 F.2d 917, 920 (5th Cir. 1974) (A Rule 41(b) dismissal is a "drastic remedy" that "should be used only in extreme

situations, as the court has a wide range of lesser sanctions."); Givens v. A.H. Robins Co., Inc., 751 F.2d 261, 263 (7th Cir. 1984) ("Dismissal with prejudice is an extreme sanction and should be used only in cases of willful disobedience of a court order or continual or persistent failure to prosecute a complaint. . . but the punishment must fit the crime, and not every instance of failure to comply with an order of court, however inexcusable, justifies total extinction of a client's cause of action.")

All Courts of Appeals have also recognized that any court reviewing a Rule 41(b) dismissal must balance those factors technically allowing dismissal with "the policy favoring disposition of cases on their merits." Nealey v. Transportacion Maritima Mexicana, S.A., 662 F.2d 1275, 1279 (9th Cir. 1980). Richman v. General Motors Corporation, 437 F.2d at 199:

> Moreover, the power of the court to prevent undue delays must be weighed against the policy of the law favoring disposition of cases on their merits.

The overriding demands of justice which require that cases be determined on the merits is of particular importance in this case. In fact, it was counsel's perserverance in attempting to correct its pleadings and put the case properly at issue which caused modest delay in responding to the court-ordered show cause.[1]/ The objective reasonableness of plaintiff's conduct may be deduced from the fact that at not time did the defendant feel so prejudiced or aggrieved in its defense that it moved for dismissal, and in fact, later moved for an enlargement of time in which to respond.

---

[1]/ All told, the "delay" in this case amounts to a total of one week.

Given the nature of the Claims Court, where plaintiff is seeking redress from one branch of government, it is particularly inappropriate for the supposedly neutral branch of government to intervene in a manner which can only benefit the government defendant, already well represented in the proceedings by counsel. If anything, the Claims Court should be more zealous in appling the "less drastic means test" of Rule 41, employ alternative sanctions and temper discretion, than would a court which has a case involving private litigants.

In its opinion in the present case, the Federal Circuit has placed itself squarely in conflict with those circuits which have unequivocally held that, because dismissal is the harshest possible sanction, it must never be the first sanction applied to a plaintiff who fails to meet time limits or obey a court order.

The Federal Circuit, in this case, held that a lower court is not required to apply any lesser sanctions before dismissing a plaintiff's case under Rule 41(b). Despite ample evidence of good faith effort on plaintiff's part, and no evidence whatsoever that docketing pressure or concerns for efficient court administration were involved in this particular case.

Thus, the Federal Circuit has created an arbitrary judicial weapon without standards or guidelines at odds with the application of Rule 41(b) by other courts. Its misinterpretation of the rule's function has elevated a sanction of last resort to be applied only in the rare case, to an unpredicable "first strike" boon for defendants. Review by this Court is therefore necessary to ensure that Rule 41(b) is uniformly and properly applied throughout the circuits, especially when the

stated reasons for its invocation relate to the court's own wishes, not guided by argument of defendant or supported by evidence of disruption to the court's docket.

B. This Court Should Grant the Writ in Order to Assert Its Supervisory Powers to Reverse the Order of Dismissal.

As argued above, by affirming the Claims Court dismissal of petitioner's complaint, the Federal Circuit sanctioned an abuse of discretion and split unexpectedly from other circuits concerning the proper application of the dismissal sanction under Rule 41(b). This deviation so far departs the accepted and usual course of judicial proceedings in other circuits so as to call for an exercise of this Court's power of supervision. Sup. Ct. R. 17.1(a).

The Claims Court's sua sponte dismissal was an unwarranted, arbitrary abuse of its discretion under Rule 41(b). The holdings

of the other circuits make it clear that dismissal with prejudice can only be considered after less severe sanctions have been imposed. The record shows no lesser sanctions were even considered by the Claims Court. As such, the Federal Circuit endorsed a procedure which is in direct conflict with the principle of fairness that, in all but the rarest of circumstances, a federal court must resolve all doubts in favor of reaching a decision on the merits; dismissal is to be the sanction of last resort and never invoked mutually. Scarborough v. Eubanks, 747 F.2d 871 (3rd Cir. 1984).

In fact, dismissal in the instant case conflicts with the established practice in the Claims Court itself. In White Moun. Apache Tribe v. United States, 5 Cl. Ct. 288 (1984), the Claims Court established that it would order dismissal under Rule 41(b) only

after a plaintiff failed to comply with an order to prosecute its case, which included sanctions less severe than dismissal. In that case, the plaintiff was ordered by the court to produce written experts' reports by January 30, 1984. Plaintiff filed a motion on January 12, 1984, to vacate the earlier order. The court denied the motion on February 7, 1984, and ordered that the reports be submitted by April 9, 1984. Plaintiff filed a new motion on April 6, 1984, seeking to disqualify the judge. It did not seek an extension of time to file the experts' opinions. By the date of the decision in the case, May 7, 1984, plaintiff had yet to submit the reports. The court noted that neither of the plaintiff's motions properly tolled the time when the reports were due under the court's orders. In fact, the plaintiff appeared to have not begun preparation of the reports by the date

of the opinion. The court stated that the record in the case "demonstrated the lack of progress in advancing preparation of expert reports -- in short, a clear record of delay and disobedient conduct." 5 Cl. Ct. at 295. Nevertheless, the court did not order dismissal and, instead, ordered that a $100 per day fine would be imposed if plaintiff did not submit the reports by May 15, 1984. The court then stated that "imposition of further sanctions pursuant to RUSCC 41(b) is preserved" for failure to comply with the order. 5 Cl. Ct. at 296.

Thus, in White Mountain, the Claims Court followed the rule recognized in the Circuit Courts of Appeals that dismissal is never the first sanction to be imposed upon a plaintiff. The Claims Court decision in the instant case was clearly an aberration, which conflicted with established Claims Court practice. This Court should therefore

exercise its supervisory powers over the Federal Courts and grant the writ so that the clear abuse of the Claims Court may be reversed.

VII. CONCLUSION.

The Federal Circuit's decision in this case departs from the law of other federal circuits concerning the proper application of sua sponte dismissal under Rule 41(b). Therefore, this court should grant petitioner's writ and resolve the conflict and correct the present injustice imposed by arbitrary sua sponte dismissal.

Respectfully Submitted,

May ___, 1986

CHARLES R. SCHRADER
Attorney for Petitioner
Kadin Corporation

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 8502217

KADIN CORPORATION, Appellant v.
THE UNITED STATES, Appellee,

Filed January 23, 1986

BEFORE: FRIEDMAN, BENNETT, and BISSELL, Circuit Court Judges

This is an appeal from a judgment of the United States Claims Court which, on the court's own motion, dismissed the appellant's complaint for failure to prosecute. We affirm.

I

In January 1983, the appellant filed a complaint in the Claims Court seeking additional compensation from the United States for work it had performed under a construction contract with the Small Business Administration. Following the

filing of the government's answer and over the next two years, there ensued a series of delays by the appellant in complying with court orders that contained specific dates for compliance and with the rules of the Claims Court. In several instances, the court permitted the filing of the appellant's untimely documents. The appellant's frequent and repeated defaults are detailed in the order of the Claims Court dismissing the suit for failure to prosecute, and need not be repeated here.

On August 23, 1984, the Claims Court granted the appellant's motion for leave to file an amended complaint. The court stated that the amended complaint was to be filed by September 1, and that by the same date the appellant was to comply with the court's outstanding order of April 2, 1984, requiring the appellant to respond to the government's discovery requests.

The appellant did not meet the requirement in the August 23 order that it comply by September 1. On September 21, 1984 (on which date the appellant still had not complied), the Claims Court issued an order to the appellant to show cause why its complaint should not be dismissed for failure to prosecute. As the Claims Court explained in its order dismissing the complaint, under the rules of the Claims Court the response to the order to show cause was due on Monday. October 8, 1984.

On October 15, 1984, the Claims Court received a letter from the appellant's counsel dated October 9, 1984, containing a one-page response. The proposed response was not accompanied by a request for leave to file out of time.

On March 1, 1985, the Claims Court refused to accept the untimely response and sua sponte dismissed the claim for failure

to prosecute. It stated that the response

> is not only untimely, but it fails to adequately respond to the show cause order.
>
> The court will not grant leave to file, out of time, this untimely response. In view of the gravity of the show cause order, every effort should have been made to comply in a timely fashion. Counsel did not even attempt to forward the response to the court until October 9, one day after the due date. Moreover, the untimeliness of this document is not an isolated occurrence, as the deficiencies outlined in the show cause order indicates.

After detailing the appellant's repeated defaults, the court concluded:

> By reason of plaintiff's failure to file a timely response to the Order to Show Cause, and further for its failure, in its untimely proffered response, to offer any justification for its failure to prosecute this matter as discussed above, the complaint is to be dismissed for failure to prosecute. RUSCC 41(b). Further, and accordingly, plaintiff's motion for leave to file an amended complaint, which motion was filed on November 30, 1984, is denied.

On April 1, 1985, the appellant

attempted to file a motion to set aside the March 1 dismissal order. The Claims Court refused to permit the filing of the motion because it was not filed within ten days of the March 1 order, as rule 83.2(f) of the rules of the Claims Court required. The court further stated that "the allegations contained in the proffered document again continue to be deficient, as were the representations set forth in counsel's response to the court's order to show cause," so that "if said motion had been filed, it would have been denied."

II

Rule 41(b) of the Claims Court, pursuant to which the court dismissed the appeal, states:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, the court may dismiss on its own motion . . .

In reviewing the Claims Court's

dismissal of a complaint pursuant to Rule 41(b), our inquiry is whether the court abused its discretion. Cf. Stock Pot Restaurant, Inc. v. Stockpot, Inc., 737 F.2d 1576, 1581 (Fed. Cir. 1984); Automated Datatron, Inc. v. Woodcock, 659 F.2d 1168, 1170 (D. C. Cir. 1981) (similar provision in Rule 41(b), Fed. R. Civ. P.). Although dismissal is a harsh sanction, we cannot say that the Claims Court abused its discretion in dismissing the complaint here.

As noted, the appellant repeatedly and without valid justification ignored both court-imposed deadlines and the court rules. Indeed, the appellant did not even timely respond to the order to show cause why the complaint should not be dismissed or request leave to file its untimely response. Similarly, its motion to set aside the order of dismissal was substantially untimely. The appellant's entire course of conduct

reflected a callous disregard for the rules and regulations of the court and fell far short of the obligations an attorney owes to a court before which he is conducting litigation.

The appellant argues that under the standards of other circuits governing the dismissal of complaints for failure to prosecute, its conduct here did not warrant that sanction. It points to various factors that according to it would have led other courts to impose a lesser sanction. We disagree. Those factors do not overcome the flagrant character of the appellant's defaults that the record reveals, and they provide no basis for overturning the Claims Court dismissal of the complaint as an abuse of discretion.

The language of the court in Automated Datatron, supra, with the substitution of "Claims Court" for "district court" shown

below, is particularly apt for the present case:

> If [Claims Court] judges are to discharge their heavy responsibilities effectively, their power to dismiss, in situations such as the one before us, must be more than theoretical.

659 F.2d at 1170.

CONCLUSION

The Claims Court acted well within its discretion in dismissing the complaint for failure to prosecute. The judgment of the United States Claims Court is affirmed.

AFFIRMED

APPENDIX B

ORDER OF DISMISSAL FOR FAILURE
TO PROSECUTE IN THE
UNITED STATES CLAIMS COURT

Claims Court No. 27-83C

KADIN CORPORATION, plaintiff v.
THE UNITED STATES, defendant.

Filed March 1, 1985

Before Judge Judith Ann Yanello

Background

This case was filed in January 1983. Shortly after joinder of issue, the court issued an inquiry regarding further proceedings, with the parties' responses due on or about May 21, 1983. Defendant responded on May 23rd, and plaintiff, on May 25th -- several days after its response was due -- filed a motion for enlargement to and including June 6th. Attached to this motion for enlargement was an affidavit stating that inadvertent omission, compounded by a busy schedule, had caused a failure to

calendar the due date. Though untimely and not accompanied by a motion for leave to file out of time, this motion was filed by leave of court, and the enlargement was allowed. The revised due date for plaintiff's response to the court's inquiry regarding further appropriate proceedings was thus June 6, 1983.

On June 6, 1983, the revised due date, plaintiff's statement was not forthcoming and indeed plaintiff was not heard from for over two weeks thereafter. On June 23, plaintiff attempted to file the required document. This proffered document was returned unfiled inasmuch as it was defective in two respects: (1) it was untimely and not accompanied by a motion for leave to file out of time, and (2) it was not signed by the attorney of record (RUSCC 11).

Following the return, unfiled, of this document, the plaintiff made no further

effort to either remedy the defects in the initial proffer and re-offer it for filing, or to in any other way comply with the court's inquiry re: further proceedings.

On July 12, 1983, the court advised plaintiff's counsel of the deficiencies in plaintiff's prosecution of the case and urged that the rules with respect to filing be complied with. The court warned that failure to comply "may result in significant sanction of or prejudice to plaintiff."

Inasmuch as defendant's response to the court's inquiry re: further proceedings indicated that trial was necessary, and in view of the absence of any response by plaintiff to this inquiry, the court, on June 12, 1983, issued a standard pretrial order. That order required that plaintiff submit requests for admissions to defendant, within 70 days or on or about September 20, 1983. Plaintiff was to indicate its

compliance with this requirement by filing with the court a certificate of service indicating forwarding to defendant. (Following plaintiff's activity, defendant was then to respond to the requests for admission and also serve upon plaintiff its requests for admissions.)

Plaintiff did not file with the court a certificate of service indicating compliance with the standard pretrial order. In fact, the court received no notification of any pretrial activity whatever. Accordingly, on November 4th, the court issued an order requiring the parties to file, within 30 days, status reports and these reports, filed on November 29 and December 5, indicated that the parties were engaged in discovery but that plaintiff had not yet complied with the standard pretrial order. Indeed, in a motion filed on January 13, 1984, plaintiff acknowledged as much and

asked that the requirement be waived.

The court, by order of January 20, 1984, directed plaintiff to comply with the pretrial order and noted that no further delay would be tolerated and no further extensions would be granted except upon a strong showing of exceptional and extraordinary circumstances.

Plaintiff thereafter timely complied with the pretrial order on or about February 20, 1984.

During the course of the pretrial preparation noted above, and as part of the parties' discovery exchanges, the defendant, on or about November 9, 1983, served upon plaintiff interrogatories and requests for production of documents. Plaintiff answered the interrogatories and then amended its answers. Believing those responses to be evasive or incomplete, defendant filed a motion to compel discovery on March 2,

1984.[1]/

Plaintiff did not respond to the motion to compel and, on April 2, 1984, the motion was allowed. In response to direction by the court, defendant filed a status report in July 1984, -- some three months after the allowance of the motion to compel -- indicating that plaintiff had not yet responded to the defendant's discovery request. Indeed, plaintiff has never provided the court-ordered discovery.

Apparently, consideration of the defendant's interrogatories and other discovery requests, as well as performance under the standard pretrial order, brought plaintiff to the belated conclusion that its claim had not been properly pleaded.

Plaintiff twice attempted to move to suspend pretrial proceedings during June and July 1983, but these proffered motions were returned unfiled because they failed to

comply with the rules governing filings (including rules on certificates of service and number of copies). (Correspondence which plaintiff attempted to address to the judge in violation of RUSCC 5(d) was returned by the judge's secretary by letter of August 8, 1984.)

On August 3, 1984, plaintiff's motion to suspend the pretrial order and for leave to file an amended complaint was filed, by leave of court, and was allowed on August 23, 1984.

The Show Cause Order

Plaintiff's motion of August 3, 1984, was allowed by the court on August 23rd and the notice of allowance specifically stated that the amended complaint was to be filed by September 1, 1984, and that plaintiff was to comply with the court's order of April 2, 1984 (allowing the defendant's motion to compel response to discovery) by that same

date.[2]/

Plaintiff did not meet the September 1, 1984 deadline with respect to either its amended complaint or its outstanding discovery responses.

Accordingly, on September 21, 1984, the court issued an Order to Show Cause why the complaint should not be dismissed for failure to prosecute. That order outlined the plaintiff's deficiencies and required that plaintiff respond to the order within 15 days. The order also called to counsel's attention portions of an order in Hey v. United States, 5 Cl. Ct. 482 (1984). In Hey, the court dismissed the complaint for failure to prosecute finding that, in response to a show cause order, counsel had described only its reasons for not advancing its case but no reason for its failure to file enlargement motions setting forth these justifications in a timely fashion.

The time for response to the show cause order began to run on the day after the filing of the order (RUSCC 6(d)) and, inasmuch as a court order was involved, no additional time was permitted with respect to service by mail (RUSCC 6(c)). The due date was thus October 6, 1984, a Saturday, and by operation of RUSCC 6(a) the actual due date was thus Monday, October 8, 1984. Filing with the court is defined as filing with (i.e., receipt by) the Clerk of the court (RUSCC 5(d)).

No response to the show cause order was received by the Clerk of the court until October 15, 1984. On that day the Clerk received a letter dated October 9, 1984, by which plaintiff's counsel forwarded a proffered response. The Clerk's notice of receipt, the cover letter received, and the response proffered by plaintiff's counsel, are attached hereto as an appendix.

Discussion

Plaintiff's proffered response is not only untimely, but it fails to adequately respond to the show cause order.

The court will not grant leave to file, out of time, this untimely response. In view of the gravity of the show cause order, every effort should have been made to comply in a timely fashion. Counsel did not even attempt to forward the response to the court until October 9, one day after the due date. Moreover, the untimeliness of this document is not an isolated occurrence, as the deficiencies outlined in the show cause order indicates.

Accordingly, absent a response to the show cause order, the complaint may be dismissed for failure to prosecute pursuant to Rule 41(b).

Even were the court to consider the justification set forth in plaintiff's

proffered response, it would be constrained to reach the same conclusion.

In its proffered response, plaintiff's counsel commits the same error as was manifest in Hey, supra, notwithstanding the fact that the dismissal in that case had been brought specifically to counsel's attention in the instant show cause order.

The proffered response states that the corporate plaintiff's offices are in Alaska and that the corporate principal needed for consultation in connection with pleadings and pretrial is located in Alaska and has been unable to "break free" from his work schedule to come to counsel's office in Portland, Oregon. (A similar representation was made by plaintiff's counsel in a letter to defendant of March 30, 1984, regarding plaintiff's attempt to respond to defendant's discovery requests. There counsel noted that the required personnel would be

available within a week, and yet no progress was made in discovery response through July 1984 as manifest from defendant's status reports at that time.)[3]/

Even if the circumstances advanced in plaintiff's proffered response would justify the granting of timely motions for enlargement[4]/, they do not explain the failure of counsel to file such motions in a timely fashion.[5]/ Moreover, plaintiff appears to view the show cause order and its response thereto as merely an opportunity to file, out-of-time and without explanation for the untimeliness, another motion for enlargement.[6]/

It is of extreme import, however, that motions for enlargement be filed in a timely manner in order that the court may efficiently manage its docket and give consideration to the party's requests (and opposing counsel's objections if any) as due

dates arise. This necessity for timely motions for enlargement has repeatedly been emphasized by the court. See M.R.K. Corp. v. United States, 6 Cl. Ct. 544 (1984) and cases cited therein.

At the very least, untimely motions for enlargement must be accompanied by a motion for leave explaining and justifying the delay and the granting of leave.

Finally, a response to an order to show cause must additionally explain and justify why due dates were not met, why enlargements were appropriate, why enlargement motions were not timely filed, and why accompanying motions for leave were not filed. In short, the response to an order to show cause must, as the order itself indicates, show just cause why the case should not be dismissed for failure to prosecute. This plaintiff has wholly failed to do.

CONCLUSION

By reason of plaintiff's failure to file a timely response to the Order to Show Cause, and further for its failure, in its untimely proffered response, to offer any justification for its failure to prosecute this matter as discussed above, the complaint is to be dismissed for failure to prosecute. RUSCC 41(b). Further, and accordingly, plaintiff's motion for leave to file an amended complaint, which motion was filed on November 30, 1984, is denied.

IT IS SO ORDERED.

s/ Judith Ann Yanello
Judge

ALL FOOTNOTES FOLLOW

1. While awaiting plaintiff's fuller response to its discovery requests, which were allegedly necessary in order for defendant to prepare its initial pretrial submission, defendant, by motion of March 29, 1984, requested that the standard pretrial order be suspended until 60 days after plaintiff adequately responded to the discovery request. This motion was allowed, and the court directed defendant to provide status reports at 30-day intervals during the period of suspension.

2. Plaintiff's motion had requested that the pretrial order be suspended until September 1, 1984, but had provided no date by which it expected to file its amended complaint. However, inasmuch as the suspension was for the purpose of preparing and filing the amended complaint, the same date was used by the court.

3. Counsel at no time had indicated why he or members of his firm have been unable to travel to Alaska to visit needed personnel and, perhaps, to review pertinent documents as well. Nor does counsel indicate why telephonic communication rather than physical consultation was unavailing.

4. If, for example, the circumstances warranted an enlargement of time beyond September 1, 1984, in order to complete a response to the discovery requests (although considerable time had already been afforded for that purpose), or for the preparation of an amended complaint, then a timely motion for enlargement might be allowed.

5. The proffered response does not indicate why plaintiff's personnel were necessary for the preparation of timely motions for enlargement of time or for motions for leave if enlargements were sought out-of-time.

6. The proffered response represents that the amended complaint was expected to be filed by November 1, 1984 (although no enlargement was requested for that purpose), but makes no mention of the overdue responses to defendant's discovery requests.

It is also noted for the record that, on or about November 1, 1984, plaintiff forwarded its amended complaint to the Clerk of the Court but this submission was not filed inasmuch as it was out-of-time and no leave had been sought for such untimely filing. On November 30, 1984, plaintiff resubmitted its proffered amended complaint with an accompanying motion for leave, which is addressed in the conclusion of this opinion.

ORDER OF DISMISSAL PURSUANT TO RUSCC 41(b) IN THE UNITED STATES CLAIMS COURT

Claims Court No. 27-83-C

KADIN CORPORATION, plaintiff v. THE UNITED STATES, defendant.

Filed April 2, 1985

Before: Judge Judith Ann Yanello

On April 1, 1985, the Clerk of the court received the attached document proffered by plaintiff's counsel. This document is attached in order to provide a complete record in this case, but the document is not separately or independently filed inasmuch as it is untimely and is not accompanied by a motion for leave to file out of time.

The plaintiff's document seeks to set aside the court's order of March 1, 1985, dismissing the case for failure to prosecute pursuant to Rule 41(b). Such a motion should be filed, pursuant to Rule 83.2(f), within 10 days or by no later than March 11,

1985. Hence, it is untimely and, as such, continues to manifest counsel's failure to comply with the court's rules and schedules.

Moreover, the allegations contained in the proffered document again continue to be deficient, as were the representations set forth in counsel's response to the court's order to show cause.

The proffered document merely reiterates that personnel from plaintiff's corporation, who were necessary to the fashioning of an amended complaint, were not available at the time that document was to have been filed.[1]/ This does not explain, however, why counsel could not, and did not, on his own and without such consultation, file requisite motions for enlargement of time.[2]/

Counsel now requests, alternatively, that the court amend its earlier dismissal to eliminate the element of prejudice in

order that the case as pleaded in the proffered amended complaint can proceed. The court did not entertain or file the proffered amended complaint. If such complaint is sufficient to maintain an action apart from the initial complaint which was dismissed by the court, as the plaintiff now contends, then the court's dismissal has no effect on the new or amended complaint in any event. Thus, there is no need to amend the dismissal of the original complaint which was the sole subject of the court's March 1, 1985 order of dismissal.

For the foregoing reasons, IT IS HEREBY ORDERED THAT: plaintiff's proffered motion not be filed and, it is further noted that if said motion had been filed, it would have been denied.

/s/ Judith Ann Yanello
Judge

ALL FOOTNOTES FOLLOW

1. The document now proffered does appear to explain why counsel or his staff could not travel to or communicate with the location of the needed personnel -- since apparently such persons were in remote areas of Alaska.

2. In some documents which were submitted earlier, estimates of needed additional time were not always accurate; counsel indicated that the corporate personnel would shortly be available but apparently, in view of subsequent events, that did not occur.

APPENDIX C

JUDGMENT IN THE
UNITED STATES CLAIMS COURT

Claims Court No. 27-83C

KADIN CORPORATION, plaintiff v.
THE UNITED STATES, defendant.

Filed April 2, 1985

Before: Judge Judith Ann Yanello

Pursuant to the order of March 1, 1985, directing dismissal of the complaint for failure to prosecute,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that the complaint is dismissed for failure to prosecute.

Frank T. Peartree

Clerk of Court

By: /s/ Debra Scriber
Deputy Clerk

ORDER DENYING PETITION FOR REHEARING IN THE UNITED STATES CLAIMS COURT

KADIN CORPORATION, Appellant v.
THE UNITED STATES, Appellee.

File February, 27, 1986

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREFOR, it is Ordered by the Court that the petition for rehearing be, and the same is hereby, Denied.

FOR THE COURT:

s/ Francix X. Gindhart, Clerk